**CHUNG KHIAW BANK BHD.**

**v.**

**RAJU JAYARAMAN KERPAYA**

HIGH COURT MALAYA, PENANG
ABDUL HAMID MOHAMED JC
[CIVIL SUIT NO. 23-248-88]
29 JULY 1991

***CIVIL PROCEDURE:*** *Plaintiff's application as against the 2nd defendant in the first suit dismissed - No appeal filed by the plaintiffs in the first suit - Subsequent order to discontinue the first suit in respect of the 2nd defendant - Defendant in the present suit - Whether estoppel applies - Other defences raised by the defendant in the second suit - Issue with regard to the notes of SAR at the hearing at first instant of the first suit.*

By a loan agreement the plaintiffs agreed to and advanced a term loan of RM1,000,000 to Hipparion (M) Sdn. Bhd. (the company). By a letter of guarantee the defendant guaranteed repayment on demand of all sums of money owed to the plaintiffs from time to time.The company defaulted in the monthly payments and subsequently on the 21 July 1986 the plaintiffs issued a writ against the company and the defendant (the first suit) for the recovery of the said sum.

The plaintiffs applied for summary judgment against both the defendants in the first suit. The notes of the SAR showed that the application was heard on 22 October 1987 and it was adjourned for decision to 24 November 1987, and the learned SAR gave judgment to the plaintiffs against the company but dismissed the plaintiffs' application as against the second defendant in the first suit. (i.e. the defendant in the instant suit). No appeal was filed by the plaintiffs in the first suit. Subsequently the plaintiffs applied for and obtained an order to discontinue the first suit in respect of the second defendant (defendant in the present suit).

On the aftermath of this the present suit was filed against the defendant in the present suit, followed by this application for summary judgment. The SAR dismissed the application. Before the learned Judge both in chambers and in open Court the central issue raised was that the plaintiffs were not estopped by the dismissal of a similar application in the first suit. Besides the other defences raised there was also an objection as to whether the SAR's notes for the first suit was decided on a preliminary objection by the defence Counsel or after a full hearing on the merit of the application.

**Held:**

**[1]** It is definately not correct to say that the application was dismissed purely on a preliminary objection. Indeed the notes do not show any preliminary objection. It was Counsel for the plaintiffs (in the first suit) who began her submission and submitted at length. Other issues raised in the defence were also argued. On this ground alone this application should be dismissed.

**[2]** Having perused the defence, I am satisfied that there are issues of both law and facts, which should be tried, besides the issues of estoppel.

*[Appeal dismissed with costs.]*

*For the plaintiffs - Ramanathan; M/s. Cheong Wai Meng & Van Buerle*
*For the defendant - Rajasingam; Rajasingam & Co.*

**JUDGMENT**

**Abdul Hamid Mohamed JC:**

By a loan agreement dated 9 August 1983, the plaintiffs agreed to and advanced a term loan of RM1,000,000 to Hipparion (Malaysia) Sdn. Bhd. (the company). By a letter of guarantee dated 3 September 1983 the defendant guaranteed repayment on demand of all sums of money owed to the plaintiffs from time to time. The company defaulted in the payment of monthly instalments. By a letter of demand dated 14 August 1985 to the company with a copy to the defendant, the plaintiffs demanded payment of RM1,072,013.17 together with interest. Both the company and the defendant failed to make any repayment. On 21 July 1986 the plaintiffs issued a writ against the company and the defendant (the first suit) for the recovery of the said sum. The plaintiffs applied for summary judgment against both the defendants in the first suit. According to the notes of the Senior Assistant Registrar the application was heard by her on 22 October 1987. It was adjourned for decision to 24 November 1987 and she gave her decision. Giving judgment to the plaintiffs against the company but dismissed the plaintiffs' application as against the 2nd defendant in the first suit (defendant in the present suit).

No appeal was filed by the plaintiffs in the first suit.

Subsequently the plaintiffs applied for and obtained an order to discontinue the first suit in respect of the 2nd defendant (defendant in the present suit).

It was after that that this present suit was filed against the defendant in the present suit, followed by this application for summary judgment. The Senior Assistant Registrar dismissed the application. The plaintiffs appealed to me in chambers. I dismissed the appeal. Further argument was heard. This is my decision after hearing further argument in open Court.

Before me both in chambers and in open Court, Counsel for the plaintiffs chose to submit on only one issue that is, that the plaintiffs were not estopped by the dismissal of a similar application in the first suit. He seemed to have assumed that. if the plaintiffs were not estopped, this Court should give judgment in the plaintiffs' favour regardless of other defences put up. That is definately not correct. The question of estoppel is only one of the defences put up by the defendant in this suit. There are other defences which should be considered in deciding whether or not to give judgment in favour of the plaintiffs.

On the question of estoppel, Counsel for the plaintiffs conceded that if the Senior Assistant Registrar had decided the application for summary judgment in the first suit on merits, the plaintiffs would be estopped from applying for summary judgment again, in this present suit.

Counsel for the plaintiffs and Counsel for the defendant disagreed whether the application for summary judgment in the first suit was decided on a preliminary objection by the defendants' Counsel or after a full hearing on the merits of the application. It is to be noted that both of them were not the Counsel who argued the applications before the Senior Assistant Registrar in the first suit. However, they both agreed that I should call for the file and look at the notes recorded by the Senior Assistant Registrar. I have done so. I find six pages of handwritten notes of the submissions by the then Counsel for the respective parties. I must confess that I cannot make out everything written by the Senior Assistant Registrar of the submissions. But it is clear that the application was argued at length. It is definately not correct to say that the application was dismissed purely on a preliminary objection. Indeed the notes do not show any preliminary objection. It was Counsel for the plaintiffs (in the first suit) who began her submission and submitted at length. Other issues raised in the defence were also argued.

On this ground alone this application should be dismissed.

However, as I have said, there are other defences put up. But as Counsel for the plaintiffs chose not to argue on them, I shall not discuss them in detail. All I should and want to say is that, having perused the defence which runs to ten pages, I am satisfied that there are issues, of both law and facts, which should be tried, besides the issues of estoppel.

This appeal is dismissed with costs. I confirm my earlier order in chambers.

Also found at [1992] 1 CLJ 666